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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND ANTHONY GARBIN, Defendant and Appellant.	H045938 (Monterey County Super. Ct. No. SS142003A)

I. INTRODUCTION

On April 1, 2016, defendant Raymond Anthony Garbin pleaded no contest to 10 counts of felony identity theft (Pen. Code, § 530.5, subd. (a))[1] after the enactment of Proposition 47, which reclassified certain felony drug and theft related offenses as misdemeanors. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) The trial court sentenced defendant to a stipulated sentence of six years eight months, and defendant appealed from the judgment.[2] Defendant's appellate counsel filed an opening brief in which no issues were raised and asked this court for an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] By order of September 5, 2018, this court has taken judicial notice of the opinion in defendant's prior appeal, *People v. Garbin* (Jan. 26, 2017, H043542) [nonpub. opn.] (*Garbin*). Our summary of the procedural background includes information that we have taken from the prior opinion.

After defendant was notified that an independent *Wende* review was requested, he submitted a letter brief arguing that Proposition 47 reduced his felonies to misdemeanors, among other claims. On January 26, 2017, this court affirmed the judgment, determining that Proposition 47 did not amend the offense of identity theft because section 530.5 was not listed under section 1170.18, subdivisions (a) and (b) as one of the statutes that had been amended or added by the act.

On May 21, 2018, defendant petitioned the trial court pursuant to section 1170.18, subdivisions (b) and (d) to recall his sentence for 10 counts of felony identity theft (§ 530.5, subd. (a)) and to resentence him to 10 counts of misdemeanor shoplifting (§ 459.5) or misdemeanor theft (§ 484). The trial court denied the petition without prejudice. Defendant now appeals the denial order, contending that the trial court erred when it denied his petition to recall his sentence and to resentence him to 10 counts of misdemeanor shoplifting (§ 459.5).[3]

For reasons that we will explain, we conclude that defendant's felony convictions for identity theft are eligible for resentencing under Proposition 47 as misdemeanor shopliftings if defendant can meet his burden to show that he "enter[ed] a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours, where the value of the property that [was] taken or intended to be taken [did] not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) Because the trial court determined that defendant's convictions under section 530.5, subdivision (a) were ineligible for relief under section 1170.18, we will reverse and remand for further proceedings consistent with this decision.

[3] Defendant does not claim on appeal that his identity theft offenses qualify under Proposition 47 as misdemeanor thefts (§§ 484, 490.2).

II. BACKGROUND

A. *Underlying Convictions*

On July 18, 2014, Muoi To Russell reported to police that six of her Wells Fargo accounts had been fraudulently accessed.[4] Russell stated that a combined total of $43,173.01 had been taken from the accounts. Money was transferred from several of Russell's accounts to her credit card account, where it was ultimately stolen.

The transactions occurred between June 16, 2014 and July 18, 2014, and were made with Russell's credit card. Several transactions involved cash withdrawals at ATMs. One transaction was made at a Best Buy where defendant purchased a laptop. Two others occurred at a Burger King where defendant purchased food with Russell's credit card. Defendant also used a service called Touch Pay, Inc. to put money on inmates' accounts using Russell's credit card, and a service from a company called Securus to put money on inmates' jail telephone accounts.

On November 2, 2015, defendant was charged by information with 10 counts of identity theft (§ 530.5, subd. (a)). As to each count, the information alleged that defendant willfully and unlawfully obtained Russell's personal information and used that information to obtain credit, goods, services, real property, and medical information without Russell's consent.

On April 1, 2016, defendant pleaded no contest to all 10 counts.[5] The trial court sentenced defendant to a stipulated sentence of six years eight months pursuant to section 1170, subdivision (h). On May 5, 2016, defendant appealed. Defendant's appellate counsel filed an opening brief in which no issues were raised and asked this court to independently review the record as required by *Wende*, *supra*, 25 Cal.3d 436. Defendant then submitted a letter brief to this court arguing that Proposition 47 reduced

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[4] Our summary of the facts is based on the October 30, 2015 preliminary hearing.

[5] The factual basis for defendant's plea was Marina Police Department report No. MG1401557.

his felonies to misdemeanors, among other claims. This court affirmed the judgment on January 26, 2017, determining regarding defendant's Proposition 47 claim that "Proposition 47 did not amend section 530.5, which criminalizes identity theft. (See § 1170.18, subds. (a) & (b), listing statutes amended or added by Proposition 47.) Thus, a violation of section 530.5 remains a wobbler, chargeable as either a felony or a misdemeanor and punishable accordingly. (§§ 530.5, 1170, subd. (h), 17.)" (*Garbin*, *supra*, H043542, at p. 3.)

B. *Proposition 47 Petition for Resentencing*

On May 21, 2018, defendant filed a Proposition 47 petition in the trial court pursuant to section 1170.18, subdivisions (b) and (d) for the recall of his sentence and for the resentencing of his 10 identity theft convictions. Defendant asserted that he should be resentenced to 10 counts of misdemeanor shoplifting (§ 459.5) or misdemeanor theft (§ 484). The trial court denied the petition without prejudice on June 22, 2018, observing that there was a "split of authority" on the issue. Defendant timely appealed.

III. DISCUSSION

Defendant contends that his identity theft convictions "qualif[y] under Proposition 47 as misdemeanor shoplifting offenses." The Attorney General counters that defendant's claim is barred under the law of the case doctrine because this court decided defendant's Proposition 47 claim in his previous appeal. The Attorney General also argues that defendant is not entitled to Proposition 47 relief because the "unauthorized use of personal identifying information is not a theft or shoplifting offense."

A. *Legal Background: Proposition 47*

On November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014.) Proposition 47 reclassified certain drug and theft related offenses as

misdemeanors instead of felonies or alternative felony misdemeanors. (§ 1170.18, subd. (a); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 308.) It also "created the new crime of 'shoplifting,' defined as entering an open commercial establishment during regular business hours with the intent to commit 'larceny' of property worth $950 or less. (Pen. Code, § 459.5, subd. (a).)" (*People v. Gonzales* (2017) 2 Cal.5th 858, 862 (*Gonzales*).) "This [shoplifting] provision is related to the general burglary statute, which also applies to an entry with intent to commit 'larceny' or any felony. (Pen. Code, § 459.)" (*Ibid.*)

In addition, Proposition 47 provided a statutory remedy for a person currently "serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor" had Proposition 47 been in effect at the time of the offense. (§ 1170.18, subd. (a).) Such a person "may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing" in accordance with the statutes that were "amended or added by this act." (*Ibid.*) If, "[u]pon receiving a petition under subdivision (a)," the trial court finds that the petitioner is eligible for resentencing, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . , unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety" (§ 1170.18, subd. (b)), which is defined in section 1170.18, subdivision (c) as "an unreasonable risk that the petitioner will commit" one of the "super strike" offenses listed in section 667, subdivision (e)(2)(C)(iv). (See *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092.)

"The ultimate burden of proving section 1170.18 eligibility lies with the petitioner." (*People v. Romanowski* (2017) 2 Cal.5th 903, 916 (*Romanowski*).) "In some cases, the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility. When eligibility is established in this fashion, 'the petitioner's felony sentence shall be recalled and the petitioner

sentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).) But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.' " (*Ibid.*)

"We review the trial court's construction of Proposition 47 de novo. [Citation.]" (*People v. Salmorin* (2016) 1 Cal.App.5th 738, 743.)

B. *Law of the Case Doctrine*

The Attorney General contends that we must not determine whether defendant is entitled to have his felony identity theft convictions reduced to misdemeanor shopliftings because the law of the case doctrine bars our reconsideration of the issue. Defendant asserts that the doctrine does not apply because there has been a change in the law and because the doctrine's application would result in a manifest injustice.

" ' "The doctrine of the law of the case is this: That where, upon an appeal, the [reviewing] court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and, as here assumed, in any subsequent suit for the same cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular." ' The principle applies to criminal as well as civil matters [citations] . . . ." (*People v. Stanley* (1995) 10 Cal.4th 764, 786 (*Stanley*).)

However, "[b]ecause the rule is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a 'manifest misapplication of existing principles resulting in substantial injustice' [citation], or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]. The unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination. [Citation.]" (*Stanley*, *supra*, 10 Cal.4th at p. 787.)

We conclude that in this instance the doctrine does not apply. In this court's previous decision, this court did not "state[] in its opinion a principle or rule of law necessary to the decision" that we would abandon here. (*Stanley*, *supra*, 10 Cal.4th at p. 786.) When defendant submitted his letter brief to this court in his previous appeal, defendant claimed that his offenses were misdemeanor "theft crimes" under Proposition 47 if the value of the property taken was less than $950. This court decided that defendant was not entitled to relief because "Proposition 47 did not amend section 530.5, which criminalizes identity theft. (See § 1170.18, subds. (a) & (b), listing statutes amended or added by Proposition 47.) Thus, a violation of section 530.5 remains a wobbler, chargeable as either a felony or a misdemeanor and punishable accordingly. (§§ 530.5, 1170, subd. (h), 17.)" (*Garbin*, *supra*, H043542, at p. 3.)

It remains true that Proposition 47 did not directly amend the identity theft statute. (See §§ 530.5, 1170.18.) Defendant did not raise in his previous appeal, nor did this court decide, whether defendant's identity theft offenses (§ 530.5, subd. (a)) qualified as misdemeanor shopliftings (§ 459.5) under Proposition 47. Further, as defendant points out, the law on Proposition 47 has evolved since this court's January 26, 2017 decision, recognizing the initiative's reach beyond the statutes enumerated in section 1170.18, subdivisions (a) and (b). (See, e.g., *People v. Page* (2017) 3 Cal.5th 1175 [theft of a vehicle (Veh. Code, § 10851)]; *Romanowski*, *supra*, 2 Cal.5th 903 [theft of access card

account information (§ 484e, subd. (d))]; *Gonzales*, *supra*, 2 Cal.5th 858 [commercial burglary (§ 459) can qualify as misdemeanor shoplifting (§ 459.5)].) For these reasons, we conclude that the law of the case doctrine does not bar our determination of defendant's claim that he is entitled under Proposition 47 to the resentencing of his identity theft convictions as misdemeanor shopliftings.

C. *Reduction of Defendant's Felony Identity Theft Offenses to Misdemeanor Shopliftings*

Defendant contends that the trial court erred when it failed to recall his sentence for the identity thefts under section 530.5, subdivision (a) and resentence him to misdemeanor shopliftings under section 459.5, subdivision (a) because he "entered commercial establishments during business hours for the purpose of using a stolen credit card to purchase merchandise valued at $950 or less" and because section 459.5, subdivision (b) "expressly limits charging on shoplifting" by stating that "[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting." As we will explain, we agree that defendant is eligible to petition for Proposition 47 relief because he may be able to demonstrate that his crimes constitute shopliftings.

Subdivision (a) of section 459.5 provides: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense. (§ 459.5, subd. (a).) In addition, subdivision (b) of section 459.5 contains an explicit limitation on charging: "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property."

In *People v. Garrett* (2016) 248 Cal.App.4th 82, 84 (*Garrett*), review granted August 24, 2016, S236012, this court determined that "entering a commercial establishment with the intent to use a stolen credit card to purchase property valued at no more than $950 constitutes shoplifting, a misdemeanor under subdivision (a) of Penal Code section 459.5."[6] There, the defendant and his accomplice entered a Quik Stop and were about to purchase gift cards with a stolen credit card when police appeared outside the store. (*Id.* at p. 85.) The defendant attempted to flee. (*Ibid.*) Police found a wallet and a credit card that had been removed from the wallet bearing the victim's name located inside the store's trash can. (*Ibid.*) The victim later told police that the wallet had been stolen from her car. (*Ibid.*) The defendant was charged with commercial burglary (§ 459) and identity theft (§ 530.5, subd. (c)(1)), among other crimes, and pleaded no contest to commercial burglary. (*Garrett, supra,* at pp. 85-86.) On appeal, the defendant claimed that the trial court erred when it denied his Proposition 47 petition for the recall of his sentence and resentencing to misdemeanor shoplifting. (*Garrett, supra,* at p. 86.)

The parties did not dispute that the defendant entered a commercial business establishment while it was open during regular business hours or that the defendant entered with the intent to use a stolen credit card. (*Garrett, supra*, 248 Cal.App.4th at p. 88.) This court held that section 459.5's statutory language, which requires the "intent to commit larceny," must be "interpret[ed] . . . as if it defined shoplifting to mean 'entering a commercial establishment with intent to commit *theft*,' " given section 490a, "which provides: 'Wherever any law or statute of this state refers to or mentions larceny,

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[6] The California Supreme Court granted review in *Garrett, supra*, 248 Cal.App.4th 82, and held the case pending its decision in *Gonzales, supra*, 2 Cal.5th 858. After *Gonzales* was decided, the court dismissed its grant of review and remanded the matter to this court for issuance of the remittitur. *Garrett* is now final and citable as precedent. (Cal. Rules of Court, rule 8.528(b)(3).)

embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor.' " (*Garrett, supra,* at p. 88.) Thus, the new offense of shoplifting "requires an intent to commit theft, which is further defined by . . . section 484 [and] . . . includes theft by false pretenses," which encompassed the defendant's conduct. (*Id.* at pp. 89-90.) This court assumed for the sake of argument that the defendant entered the Quik Stop with the intent to commit felony identity theft (§ 530.5) *and* the intent to commit theft by false pretenses (§ 484, subd. (a)). (*Garrett, supra,* at pp. 87-89.) This court held that because subdivision (b) of section 459.5 "provides that any act defined as shoplifting 'shall be charged as shoplifting' and may not be charged as burglary or theft of the same property," defendant could not be charged with burglary even if he intended to commit felony identity theft when he entered the store. (*Garrett, supra,* at p. 88.)

Shortly after this court decided *Garrett,* the California Supreme Court issued its decision in *Gonzales, supra,* 2 Cal.5th 858. The California Supreme Court considered whether a conviction for second degree burglary could be resentenced as misdemeanor shoplifting where the defendant entered a bank with the intent to pass forged checks. (*Id.* at pp. 862, 864.) The court held that the specific intent required to prove shoplifting may be satisfied by the specific intent to commit nonlarcenous thefts, including theft by false pretenses. (*Id.* at p. 862.) Accordingly, the court determined that the "defendant's act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute" and that it was proper for the defendant to "petition for misdemeanor resentencing under Penal Code section 1170.18." (*Ibid.*)

In reaching its decision, the Supreme Court rejected the Attorney General's argument that the defendant was ineligible for resentencing because he entered the bank not just with the intent to commit larceny, but also with the intent to commit identity theft under section 530.5, subdivision (a) and "his felony burglary conviction could have been

based on his separate intent to commit that offense." (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) The court observed that subdivision (b) of section 459.5 "requires that any act of shoplifting '*shall be charged* as shoplifting' and no one charged with shoplifting 'may also be charged with burglary or theft *of the same property*.' " (*Gonzales*, *supra*, at p. 876.) Based on that statutory language, the court determined, "*A defendant must be charged only with shoplifting when the statute applies.* It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct." (*Ibid.*, italics added.)

In *People v. Jimenez* (2018) 22 Cal.App.5th 1282, 1285 (*Jimenez*), review granted July 25, 2018, S249397,[7] the Court of Appeal held that the trial court properly reduced the defendant's felony convictions for identity theft under section 530.5, subdivision (a) to misdemeanor shoplifting under section 459.5, subdivision (a). The court followed this court's decision in *Garrett* and the Supreme Court's decision in *Gonzales* to determine that subdivision (b) of section 459.5 "barred the People from charging Jimenez with identify theft under section 530.5, subdivision (a) when his underlying conduct constituted shoplifting." (*Jimenez*, *supra*, at p. 1291.)

The defendant in *Jimenez* twice entered a check-cashing business and fraudulently cashed the victim's checks made payable to himself. (*Jimenez*, *supra*, 22 Cal.App.5th at p. 1285.) The defendant was convicted of two counts of identity theft under section 530.5, subdivision (a). (*Jimenez*, *supra*, at p. 1286.) The Court of Appeal observed that the defendant's "conduct [was] identical to Gonzales's conduct. They both entered a commercial establishment during business hours for the purpose of cashing stolen checks valued at less than $950 each. Both defendants committed 'theft by false pretenses,' which 'now constitutes shoplifting under [section 459.5, subdivision (a)].'

[7] The California Supreme Court denied the request for an order directing depublication of the *Jimenez* opinion when it granted review.

(*Gonzales*, *supra*, 2 Cal.5th at p. 862; see id. at pp. 868-869 . . . .)" (*Id.* at p. 1289.) Thus, "[t]he trial court properly concluded that Jimenez's acts of shoplifting could not be charged as felony identity theft under section 530.5, subdivision (a)." (*Id.* at pp. 1289-1290.)

Based on section 459.5's statutory language and the reasoning of *Garrett*, *Gonzales*, and *Jimenez*, we conclude that defendant's convictions for identity theft under section 530.5, subdivision (a) are eligible for reduction under Proposition 47 if defendant can demonstrate that his crimes qualify as misdemeanors shopliftings under section 459, subdivision (a). Given section 459.5, subdivision (b)'s explicit charging limitation, if defendant can establish with respect to his identity theft convictions that he "enter[ed] a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours" and that the value of the property taken did not exceed $950 (§ 459.5, subd. (a)), he must be resentenced to shoplifting unless the trial court determines that prior convictions render defendant ineligible for relief (§ 459.5, subd. (a)) or that resentencing defendant would pose an unreasonable risk of danger to public safety (§ 1170.18, subd. (b)). (See *Gonzales*, *supra*, 2 Cal.5th at pp. 862, 876-877; *Garrett*, *supra*, 248 Cal.App.4th at p. 88; *Jimenez*, *supra*, 22 Cal.App.5th at pp. 1289-1290.)

The Attorney General urges us to follow *People v. Sanders* (2018) 22 Cal.App.5th 397 (*Sanders*), review granted July 25, 2018, S248775, and *People v. Liu* (2018) 21 Cal.App.5th 143 (*Liu*), review granted June 13, 2018, S248130. However, both *Sanders* and *Liu* determined that the identity theft convictions at issue did not qualify as petty thefts (§ 484) within the meaning of section 490.2.[8] (*Sanders*, *supra*, at p. 400; *Liu*,

[8] *Liu* also involved a different type of identity theft than that present here. The defendant in *Liu* was convicted of obtaining the identifying information of 10 or more people under section 530.5, subdivision (c). (*Liu*, *supra*, 21 Cal.App.5th at p. 150.) (continued)

supra, at pp. 150, 152-153.) Neither case determined whether the defendant's conduct qualified as shoplifting within the meaning of section 459.5.

Because the trial court made the threshold determination that defendant's identity theft convictions were ineligible for designation as misdemeanor shopliftings, it never considered whether the evidence offered in support of defendant's petition was sufficient to establish eligibility for relief under section 1170.18, subdivision (a). Thus, the matter must be remanded to allow the court to consider defendant's petition and to determine with respect to each count of conviction whether defendant can establish that he "enter[ed] a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours, where the value of the property that [was] taken or intended to be taken [did] not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) If the trial court determines that defendant's identity theft convictions qualify as misdemeanor shopliftings, it must then determine whether defendant has any disqualifying prior convictions (§ 459.5, subd. (a)) or whether "resentencing [defendant] would pose an unreasonable risk of danger to public safety" (§ 1170.18, subd. (b)). We express no opinion on these issues.

IV. DISPOSITION

The June 22, 2018 order denying defendant's petition for recall of sentence and resentencing pursuant to Penal Code, section 1170.18, subdivisions (b) and (d) is reversed. The matter is remanded for the trial court to determine: (1) whether defendant can establish that the conduct underlying his identity theft convictions constituted shoplifting (Pen. Code, § 459.5, subd. (a)); (2) whether defendant has any disqualifying prior convictions (Pen. Code, § 459.5, subd. (a)); and (3) whether resentencing defendant

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Unlike a conviction under subdivision (a) of section 530.5, as we have here, subdivision (c) does not require *the use* of the personal identifying information to obtain goods or services. (§ 530.5, subds. (a), (c).)

"would pose an unreasonable risk of danger to public safety" (Pen. Code, § 1170.18, subd. (b)).

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

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